F. M. S. REPORTS.

[APPELLATE CIVIL JURISDICTION]
HOWES, J.
March 12, 1935.

PERAK PENGHULU'S APPEAL No. 9 of 1934.

[ON A REFERENCE UNDER SECTION 586, CIVIL PROCEDURE CODE. 1918]

The Civil Procedure Code, 1918, sub-section 544(ii)—Procedure on hearing of an appeal from the Court of a Penghulu.

In an appeal from the Court of a Penghulu under sub-section 544 (ii) of the Civil Procedure Code, 1918, the Magistrate must re-hear the case which is the subject matter of the appeal. He is not entitled to hear and determine such appeal on the notes of evidence recorded by the Penghulu.

HOWES, J.—In this case, the Magistrate, Kuala Kangsar, has, under Section 586 of the Civil Procedure Code, 1918, referred to this Court for its decision, the following question:—

> "Whether an appeal from the Court of a Penghulu to a Magistrate of the First Class shall be by way of rehearing; or shall be heard and determined on the notes of evidence recorded by the Penghulu."

Section 544 (ii) of the Civil Procedure Code, 1918, reads—

> "Appeals from the Court of a Penghulu to the Court of a Magistrate of the First Class shall be heard in a summary manner and with as little formality as possible. The procedure at present in force in such appeals shall continue in force, subject to any amendments which may from time to time be directed by the Judges."

No such amedments have, so far, been directed.

Section 544 (ii) of the Civil Procedure Code, 1918, is identical with Section 501 (iii) of the Perak Civil Procedure Code, 1902, (No. 11/1902) which State Enactment was repealed by the Civil Procedure Code, 1918.

The Perak Civil Procedure Code, 1902, repealed the Perak Order in Council No. 6 of 1893 (Perak Government Gazette (1893) Vol. VI, page 656) which laid down the procedure to be followed at that time in Civil Appeals; including appeals from a Penghulu or Kathi to the Court of a Magistrate of the First or Second Class.

Paragraph 7 of Order in Council No. 6 of 1893 enacted that—

> "all appeals shall be by way of re-hearing, and shall be heard and determined upon the evidence of the parties thereto and their witnesses."

Since no other procedure was therein provided, rehearing of the case was "the procedure at present in force in such appeals" when the Perak Civil Procedure Code, 1902, (repealing the Order in Council No. 6 of 1893) was enacted; and again this was the procedure "at present in force" when the Civil Procedure Code, 1918, Section 544 (ii) was enacted.

In the absence of the directions from the Judges mentioned in Section 544 (ii), it follows that in appeals from the Court of a Penghulu to the Court of a Magistrate of the First Class, the procedure to be followed is that which was laid down in the (now repealed) Order in Council No. 6 of 1893 para. 7 (*supra*) viz, that all appeals shall be by way of rehearing.

I therefore hold that in an appeal from the Court of a Penghulu under Section 544 (ii) of the Civil Procedure Code, 1918, the Magistrate must re-hear the case which is the subject matter of the appeal; and is not entitled to hear and determine such appeal on the notes of evidence recorded by the Penghulu.

[APPELLATE CRIMINAL JURISDICTION]
THOMAS, C.J.
July 22, 1935.

THE PUBLIC PROSECUTOR.....Appellant

v.

MOHAMED SHAHAR BIN ABDUL HAMID Respondent.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 21 of 1935.]

The Public Authorities Protection Enactment, 1929, section 2—Applicability of, to a criminal prosecution.

Section 2 of the Public Authorities Protection Enactment, 1929, applies only to the performance or non-performance of official duties, and affords a certain amount of protection to officials in respect of their official duties by requiring that notice should be given. It does not extend to any offence committed contrary to the Penal Code, because it cannot be part of any official's duty to commit an offence contrary to the Penal Code.

H. C. Willan, Deputy Legal Adviser, for the appellant.

S. M. Sharma for the respondent.

THOMAS, C.J.—I have no doubts whatever in this case, so I propose to give judgment at once. At the hearing before the Magistrate Mr. Sharma took an objection that under Enactment No. 20 of 1929 a month's notice should have been given to the accused before any prosecution was commenced, and that inasmuch as that notice had not been given the prosecution could not proceed. This objection was allowed, and the accused was discharged. From that order the Public Prosecutor appeals.

Section 2 (i) (a) & (b) of Enactment No. 20 of 1929 reads as follows:—

> "Where any action prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Enactment or rules made thereunder or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Enactment, rules, duty or authority the following provisions shall have effect:

(i) The action prosecution or proceeding shall not lie or be instituted unless—

(a) one month's previous notice in writing of the intended action and of the cause thereof is given to the defendant;

(b) it is commenced within three months next after the act, neglect or default complained of or in case of a continuance of injury or damage within three months next after the ceasing thereof."

The question immediately arises, under what Enactment or what rules or what duty was the Penghulu acting? Reference has been made to section 66 of the Courts Enactment by which he was to have all the powers given to him by the 'kuasa'. This 'kuasa' has been produced, and a translation has been put in with regard to two of its provisions, viz. 22 and 23. These show that when he receives money he has to make an entry in his book, and that all the money collected has to be paid in on the succeeding month to the District Officer of the District. It has not been shown to me that there is anywhere a section providing for a penalty if the accused omits to pay in the money.

If it is the duty of an officer to pay money in, and he neglects that duty, then he might be liable, provided there were a section making it an offence punishable in a criminal Court or in a Civil Court that he should be liable to any prosecution or action. If there is such a section, then he cannot be prosecuted, and action cannot be taken against him unless section 2 (i) (a) or (b) has been complied with. But in such a case the offence which has been committed and the punishments which are contemplated are under the Enactment which has been infringed. If failure to pay in money involves an offence which is not directly punishable by the Enactment requiring its payment, or if the money has been used unlawfully, then the officer does not come under the provisions of the Enactment of 1929. Now, what is the charge against the accused. It is one of criminal breach of trust which is defined in the Penal Code as follows:—

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'".

This is an entirely different matter to the infringement of an Enactment requiring an act to be done by an officer and imposing a penalty for non-compliance with the requirements of the Enactment.

In the present case the offence with which the accused is charged is not the infringement of any such Enactment. It is not the failure in performing his duty by not paying in an amount received. A much more serious offence is alleged viz. that the Penghulu not only did not pay in the money but appropriated it to his own use, and has thereby committed the offence known as criminal breach of trust.

Section 2 of Enactment No. 20 of 1929 applies only to the performance or non-performance of official duties, and affords a certain amount of protection to officials in respect of their official duties by requiring that notice should be given. It does not extend to any offence committed contrary to the sections of the Penal Code. The reason is obvious, for it cannot be a part of any official's duty to commit an offence contrary to the Penal Code.

I have, therefore, come to the conclusion that the learned Magistrate was wrong in allowing the objection that was taken. The appeal must be allowed, and the case must be sent back to the Magistrate to hear and determine.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]
THOMAS, C.J., BURTON, Ag. C.J. (S.S.) & TERRELL, J.
September 12, 1935.

TAN THIA KHWA
CHOP BAN HIN LEONG AND COMPANY
Defendants-Appellants

vs.

TAN EE TONG
CHOP ENG HUAT.....Plaintiffs-Respondents

[PERAK CIVIL APPEAL No. 6 of 1935]

The Courts Enactment 1917, section 17 (c)—Costs—The Civil Procedure Code, 1918, section 218—Discretion of Court—Order as to costs founded on error of law.

The plaintiffs claimed damages for assault and trespass, also for breach of contract. At the trial no special damage was proved as to the breach of contract but the Judge, in awarding the plaintiffs $300 damages, included in that amount nominal damages for the breach of contract, and also ordered the defendants to pay two-thirds of the plaintiffs' taxed costs. On appeal counsel for the defendants-respondents admitted that the amount by which the damages would be enhanced by taking into account the breach of contract would be so little as practically to make no difference.

Held, on appeal:—

Even though no special damage had been proved as to the breach of contract the plaintiffs were entitled to some damage, and the trial Judge was right in taking such breach into consideration when awarding damages. No leave to appeal had been obtained and the appeal having been made only nominally on the merits and actually as to costs, must be dismissed by virtue of the provisions of section 17 (c) of the Courts Enactment, 1918.—*per* Sir Samuel Thomas, C.J.

When a Court founds its discretion in awarding costs on a wrong principle or on a mistake of law, the Court of Appeal is precluded from entertaining an appeal by section 17 (c) of the Courts Enactment, 1918, when leave to appeal has not been granted, unless there is an appeal as to the merits which is real and not colourable.